

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Van Chuong Vo

REPRESENTATIVE: Mr Cuong Vo (MARN: 9250600)

CASE NUMBER: 2114558

HOME AFFAIRS REFERENCE(S): BCC2014/3069587 BCC20143069587

MEMBER: SM Michael Cooke

DATE: 13 July 2023

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 13 July 2023 at 1:42pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – Federal Circuit and Family Court remittal – genuine intellectual engagement with applicant's claims and evidence – genuine spousal relationship – financial aspects – nature of the household – social aspects – nature of the commitment – any other circumstances of the relationship – decision under review affirmed

1.

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65, 104

Migration Regulations 1994 (Cth), r 1.15A; Schedule 2, cls 820.211, 820.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration and Border Protection to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
3. The applicant applied for the visa on 18 November 2014 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(d)(ii) because the applicant did not meet the requirements of the Schedule 3 criteria and convincing 'compelling reasons' for the available waiver.
5. The matter is before the Tribunal because of a Court order remitting the matter to the Tribunal for reconsideration. The Court's remittal reason of the previously constituted Tribunal's decision was that the Tribunal did not have a genuine intellectual engagement with the applicant's claims and evidence with respect to the sponsor's mother only being able to provide assistance for 6 months a year.
6. The applicant appeared before the Tribunal on 24 November 2022 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor (Ms Tran). The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages.
7. The applicant was represented in relation to the review. The representative (Mr Cuong Vo) attended the hearing.
8. On 16 December 2022 the Tribunal issued an Invitation pursuant to s.359A and s.359(2) as follows:

9. INVITATION TO COMMENT ON OR RESPOND TO INFORMATION AND TO PROVIDE INFORMATION – MR VAN CHUONG VO

10. I am writing on instruction from the Member conducting your review, in relation to the application for review made by you in respect of a decision to refuse to grant a Partner (Temporary) (Class UK) visa.
11. **Invitation to comment on or respond to information**
12. In conducting the review, we are required by the Migration Act 1958 to invite you to comment on or respond to certain information which we consider would, subject to your comments or response, be the reason, or a part of the reason, for affirming the decision under review.
13. Please note, however, that we have not made up our mind about the information.
14. The particulars of the information are:

- The sponsor indicated to the Tribunal in its recent hearing that she was mother of three children. She did not divulge to the Tribunal that she had a further (extramarital) child in 2018. Evidence from historical Tribunal files indicates the sponsor has actually given birth to two extra-marital children during the course of her relationship with the applicant. Thus, she has four children in total.
- The sponsor furnished a birth certificate to the Tribunal in 2020 indicating she had given birth to an extra-marital child in 2018. She refused a Tribunal (separately constituted) request to undertake a DNA test on her fourth child to reveal its parentage to the Tribunal (separately constituted). The sponsor admitted in oral evidence to the present Tribunal that the third child's father is her former husband. She indicated she had lived with the latter person for 14 months during the course of her spouse relationship with the applicant.
- The sponsor has previously submitted birth certificates for her third and fourth children which do not indicate the applicant is their father. This is despite being married to the applicant since 2014 and the applicant's sponsoring spouse.
- The sponsor applied for an (unsuccessful) Visitor visa application to allow her mother to visit Australia. She indicated to the Tribunal (separately constituted) that she had four children and that her fourth child had 'special needs'. She also claimed in the Visitor visa application that the reason for the proposed visit of her mother was that her four children needed their grandmother to care for them. She said her children did not want to be minded by non-family members.
- In the hearing, the sponsor said a significant 'compelling reason' for Tribunal waiver of the Schedule 3 criteria was because she needed the applicant to care for her children and allow her to pursue her business interests in Vietnam and Australia.
- The applicant disclosed in the hearing that he deliberately misrepresented his family background on his previous Student visa application to secure a successful migration outcome. He indicated that his agent advised that his family (who were farmers) had an income profile too low to meet Department guidelines. His agent, therefore, created a fake family income profile to help secure successful grant of his Student visa.
- The sponsor was not completely truthful with the Tribunal in the hearing regarding the size of her family and did not disclose that she had a fourth child or his father.
- The applicant previously deliberately misrepresented himself to the Department to secure a successful migration outcome (Student visa).

15. If we rely on this information in making our decision, we may find that that the applicant and sponsor are unreliable witnesses. Furthermore, the Tribunal may conclude that they are not in a genuine and continuing spouse relationship (as claimed) which is a requirement to meet the definition of spouse at s.5F of the Act and a requirement for the visa at cl.820.211(2) of Schedule 2 of the Migration Regulations 1994 (Cth).

16. This could form the reason, or part of the reason, for affirming the Departmental decision to refuse the applicant the grant of a Partner (Temporary) (Class UK) visa. You are invited to give comments on or respond to the above information in writing.

17. Invitation to provide information

18. You are also invited to provide the following information in writing:

- Please indicate who is the father of your sponsor's fourth child.
- Please indicate the exact role you play in the family businesses.

19. The applicant's representative responded to the Invitation as follows:

20. 1.Introduction:

21. Thank you, the Member to provide the visa applicant and the sponsor the opportunity to present their answers in relation to their relationship, which both did truthfully revealed to the Member at the hearing on 24 November 2022.

22. In accordance with the letter on 16 December 2022, the Registrar has requested the sponsor and the applicant again to confirm the two issues, which are as follows

23. 2. You are also invited to provide the following information in writing:

24. 2.1 "Please indicate who is the father of your sponsor's fourth child".

25. As at the hearing on 24 November 2022, the sponsor confirmed that her fourth child was with her ex-husband, not with the applicant. The reason was that during the time she was living with her current spouse, but due to her children missed their father and she took them to visit the father and she did have relationship with him.

26. As a result, she had been pregnant with him, not the applicant. The AAT requested her current husband (the applicant) to take DNA, but she and the applicant did not because she knew the outcome; however, the applicant had not been sure and the sponsor again confirms that her fourth child is with her ex-husband, not with the applicant. The sponsor wishes the Member to consider her current husband (the applicant).

27. The sponsor again and again confirms that the relationship between her and the applicant is genuine, just only 14 months on and off with her ex-husband, because her children wished to be with their father and she fell into relationship with him, but having been completely finishing, after the sponsor gave birth to her fourth child.

28. 2.2 "Please indicate the exact role you play in the family business".

29. In Australia, The CITY SHINY NAILS & BEAUTY Business Company has been running at 42 Homing Park Dr, Horningsea Park, NSW 2171. The applicant has a main role to remove all goods into the storage, at times goods been downloaded, mainly gloves and clothes for workers which have been imported from Vietnam. The business has been continuing.

30. Apart from his role as such, the applicant also plays his father's and husband's role in the family, household and other work at home in daily activities.

31. 3. Conclusion:

32. The visa applicant and the sponsor have been living together in the wife's and husband's relationship, working hard and look after her children and the business for theirs and the children.

33. The sponsor and the applicant wish the Member to consider the application and your kind approval would be highly regarded.

34. Yours respectfully yours

35. Cuong M. Vo

36. For the following reasons, the Tribunal has concluded that the **decision under review should be affirmed**.

CONSIDERATION OF CLAIMS AND EVIDENCE

37. The issue in the present case is whether the applicant meets the definition of spouse found in s.5 of the Act.

38. Departmental records indicate the applicant's immigration history is as follows:

- On 4 November 2012, he first arrived in Australia on a Student visa (subclass 573). This visa was cancelled on 28 February 2014.
- You remained unlawfully in Australia from 28 February 2014 to 14 November 2014.
- On 10 November 2014, he lodged an invalid Partner application.
- On 14 November 2014, he was granted a Bridging E visa on the ground that he will lodge a visa application in Australia.
- He currently remains the holder of a Bridging E visa (subclass 050) which was granted in association with the Partner application (the subject of this review) which was lodged on 18 November 2015.

SPOUSE (cl 820.211(2)(a), cl 820.221)

Whether the parties are in a spouse relationship

39. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian permanent resident.
40. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

41. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. On the available evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

Are the other requirements for a spouse relationship met?

42. Findings and reasons about each matter in reg 1.15A(3)(a), (b), (c) and (d), and any other circumstances of the relationship under reg 1.15A(2) as follows:

- Financial aspects of the relationship – including joint ownership of assets; joint liabilities; extent of pooling of financial resources; any legal obligations owed to the other party; any sharing of day-to-day household expenses.
43. The sponsor claimed in the hearing that the applicant was very involved in their joint businesses which were nail shops and a rubber glove importation business. The parties have sent bank statements to the Tribunal from a joint account. They have evidenced also being partners in a registered company. The bank statement furnished by the parties indicates it is used for business as well as personal activity.
44. The Tribunal is satisfied that the parties have evidenced financial aspects of the relationship such as pooling of financial resources and sharing of day-to-day household expenses. Also, joint ownership of assets has been evidenced and (presumably) joint liabilities as joint owners and any attendant legal obligations owed to the other party as business partners.
- Nature of the household – including any joint responsibility for care and support of children; parties' living arrangements; and any sharing of housework.
45. The parties indicated at the hearing that they lived in a household of three children where the sponsor claimed the applicant had significant joint responsibility for the care and support of the children and housework. This was because she had to travel regularly on business to Vietnam. However, additional information available to the Tribunal indicated the sponsor actually had four children - including one with developmental issues - which she did not disclose at the present Tribunal hearing.
46. She informed in a recent submission her third and fourth children were apparently conceived extra-maritally. She has also admitted in oral and written evidence that her ex-husband is the father of the third and the fourth child. Both birth certificates previously submitted to the Tribunal did not indicate a birth father in the appropriate place on the birth certificates. The children were born in 2016 and 2018. The parties were married to each other in 2014. The Department apparently had not been made aware that the third and fourth child's birth father was not the applicant - but actually her ex-husband. This was because the applicant never furnished a 'change in circumstances' declaration to the department which is required by s.104 of the Act. Furthermore, she had refused to take a DNA test when requested by the (separately constituted) Tribunal. Following invitation, she has confirmed the parentage to the present Tribunal.
47. The Tribunal has received information (disclosed in the s.359A response) regarding the reg.1.15A(3) consideration of 'any joint responsibility for care and support of children'. The Tribunal is aware that the sponsor attempted (unsuccessfully) to bring her mother from Vietnam on a Visitor visa at one stage. The reason for the proposed visit was apparently because her children 'did not want to be minded by a non-family member'. This suggests possible alternative childcare scenarios. One scenario is that the children did not accept the applicant as their father - despite the claims of the parties. This is entirely feasible. The applicant is not their biological father, and the sponsor has previously 'visited' her ex-husband and had extensive sexual relations with him - despite previously claiming to the delegate that she was 'very depressed by the horrible treatment by her previous husband'.

48. The other possibility is that the applicant does/did not really live with the applicant, and thus she needed her mother to cope with caring for four children whilst she was overseas doing international business. The parties have not disclosed to the Tribunal in their most recent submission whether the children's biological father has any role in their care and upbringing.
49. Regarding the consideration 'any joint responsibility for care and support of children', the parties have insisted that there is 'joint responsibility' and as a corollary 'sharing of housework' in their response to the s.359 Invitation. The Tribunal is not prepared to accept this claim under the circumstances elaborated above. Furthermore, the parties have presented no contemporary evidence of this consideration – except their own say-so.
50. The Tribunal has serious concerns with the parties' living arrangements. The parties were married to each other in 2014. However, for a considerable period of time between 2016 and 2018 (at least) the sponsor was 'visiting' the ex-husband who she categorized as treating her horribly. Their 'visiting' relationship with her ex-husband was so profound that during this period she had a further two children together with him. None of this information was disclosed to the authorities. The applicant produced a third child in 2016 and a fourth child who was born in 2018. Yet the sponsor claimed the 'visiting' relationship was only for 14 months and 'off and on'. The Tribunal is not persuaded that this is so based on its serious credibility concerns with the sponsor's truthfulness and the normal gestation times for a child times two (18 months).
51. The Tribunal is satisfied from the evidence before it that both parties are plainly untrustworthy and, thus, unreliable witnesses. The basis for this conclusion is the longevity of the ex-marital relationship the sponsor maintained early in the relationship and their attempt to hide it from the authorities. This behaviour directly contradicts the 'genuine and continuing spousal relationship' image the parties' had sought to portray through their photographic and Form 888 evidence given by their supporters as proof of same. Indicative of this behaviour (in the particular case of the applicant) is that he admitted to the Tribunal in the hearing that he had deliberately misrepresented his financial status to the Department when seeking grant of his (later cancelled) Student visa. This, he informed, was done to secure a successful migration outcome - being entrance to Australia.
52. The pattern of behaviour exhibited by the sponsor and applicant from time of application (in the Tribunal's view) is indicative of untrustworthiness. They failed to inform the Department of the obligatory and significant 'change in circumstances' (their non-exclusivity) during the course of their married relationship. The non-exclusivity of the parties was followed by the birth of two extramarital children – which was also undisclosed. Crucially, the male parentage of the two extra-marital children was also disguised on their birth certificates by blank entries. Even when the Tribunal (separately constituted) was dealing with issues to do with the care of the fourth child, the sponsor sought to avoid confirming its true male parentage - by refusing to conduct a DNA test. The child's parentage was finally disclosed to the present Tribunal pursuant to a s.359A Invitation.
53. The Tribunal is not satisfied on the cumulative evidence that, despite their claims, the nature of the parties' household arrangements is spousal in nature.
- Social aspects of the relationship – including whether parties represent themselves to other people as being married to each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.
54. The Tribunal notes that claims have been made that the social aspects of the relationship are spousal in nature. There were photographs submitted to the Tribunal (separately constituted) of the parties in the early stage of the relationship. These were submitted as

‘planning and undertaking joint social activities together’ and with friends. This documentation indicated the parties ‘represented themselves to other people as being married to each’ and seeking to prove an acceptance of their married relationship. Various Form 888 declarations were also sent in by supporters of the parties swearing that the parties were in a genuine and continuing spouse relationship. However, this evidence was then contradicted by their actual marital behaviour (see earlier).

55. The Tribunal has received no probative contemporary evidence indicating the social aspects of the relationship.
56. The Tribunal is not satisfied on the cumulative evidence that the social aspects of the relationship disclose a genuine spousal social relationship between the parties.
 - Nature of persons' commitment to each other – including duration of the relationship; the length of time they have lived together; and whether they see the relationship as long-term.
57. During the course of her claimed spouse relationship with the applicant, the sponsor indicated that she had ‘visited’ her husband. She gave birth to an extra-marital child in 2016 with him. She claimed that this was a temporary separation. However, she did not divulge in her oral evidence to the present Tribunal that she had given birth to a further ex-marital child in 2018 – also by her ex-husband. She has subsequently done so in response to a recent s.359 Invitation asking her to comment on this anomaly.
58. The applicant disclosed in the s.359 response that she had been visiting with her ex-husband for 14 months “on and off”. She claimed it was at the request of her children. However, this contrasts with an earlier declaration to the Department in which the sponsor had claimed that “she was very depressed due to the horrible treatment by her previous husband”. Yet despite this assertion, the record shows that she visited with her former husband for a lengthy period of time. She gave birth to two further children whilst living with him. She has claimed, in response to this revelation, that she did this because her children ‘missed their father’. The Tribunal gives this response significant negative weight as evidence of the nature of the claimed commitment of the parties.
59. The sponsor indicated in the hearing and in their latest submission that, despite all the births and time she had spent away from the applicant, she still had returned to living in a genuine and continuing relationship with the applicant. He had stood beside her when she went bankrupt for instance. The Tribunal does not accept this claim based on her prior statement (“horrible treatment”), her poor credibility and the longevity and intensity of her previous conjugal relationship with her former husband.
60. The parties have claimed to be in a relationship since 2013 and spouses since 2014. The sponsor claimed she had eventually returned to live with the applicant (after 14 claimed months) exclusively because he was always there for the children - especially when she had gone bankrupt. Her business is now flourishing - she claims. By this she intended presumably to illustrate the successful degree of companionship and emotional support the parties draw from each other and, further, that the co-habitation with her ex-husband was a temporary aberration. She insists that they continue to see their relationship as long-term. Yet she has claimed in later evidence that her children had begged her to ‘resume’ living with her ex-husband (to which she patently agreed) and, still later, to a (separately constituted) Tribunal that she wanted her mother to visit Australia as her children ‘did not want to be minded by non-family members’. In their recent submission the parties have maintained they care for all the children.

61. The Tribunal gives heavy negative weight to the significant fact that the sponsor has had two further (undisclosed at the time) children to her ex-husband during the course of her marriage to the applicant. The Tribunal gives heavy negative weight to the evidence before the Tribunal which indicates that the sponsor attempted to conceal the male parentage of the later children on their birth certificates (tendered) to the Tribunal (separately constituted). Presumably, this was done so as not to draw the attention of the authorities to the sponsor's lengthy (and undeclared) extra-marital relationship with her ex-husband. Crucially, at the same time she has 'visited' she has had no children with the applicant during 8 years of marriage to him. This fact is not indicative of spousal commitment - in the Tribunal's opinion - nor that the parties see the relationship as long-term. Furthermore, it is not persuaded for that reason that the period of marital non-exclusivity was just a temporary aberration/hiatus in the relationship - as suggested by the parties.
62. The Tribunal is not satisfied from the evidence that the applicant and sponsor have a spousal degree of companionship and emotional support which they draw from each other - as claimed. Her conduct throughout their marriage negates any notion of spousal long-term commitment. In their submission the parties seek to argue that her extra marital non-exclusive relationship with her ex-husband was all a temporary aberration. She claims her marriage to the applicant has resumed and is genuine and continuing.
63. The Tribunal does not accept this argument in view of the parties' dubious credibility and prior proven non-exclusive married relationship. These issues disclose a significant lack of commitment to the relationship by the parties over many years and from time of application. Furthermore, the Tribunal does not accept their claim that they see the relationship as long-term.
- Any other circumstances of the relationship.
64. The applicant did not inform the Department of his 'change in circumstances' (as required by s.104 of the Act) when his wife departed the relationship and reunited with her ex-husband. She subsequently had two extra-marital children in 2016 and 2018 - both by her ex-husband.
65. The Tribunal has considered 'the full circumstances of the relationship' and makes the following findings against s 5F(2)(b)-(d). The Tribunal does not accept (on the cumulative evidence) that the parties have 'a mutual commitment to a shared life to the exclusion of others and a genuine and continuing relationship where they live together or not separately and apart on a permanent basis' at time of application and at time of this decision.
66. **Consideration of the Appeal**
67. The Court remittal reason of the (previously constituted) Tribunal's decision (28 July 2017) concerned the failure of the applicant to meet the Schedule 3 criteria. The Tribunal's decision to affirm the Departmental refusal was successfully appealed by the applicant. The Court found that the Tribunal (previously constituted) did not have a genuine intellectual engagement with the applicant's claims and evidence with respect to the sponsor's mother only being able to provide assistance 6 months a year.
68. The present Tribunal finds it unnecessary to consider the issue surrounding the sponsor's mother in relation to the Schedule 3 criteria again because it is not satisfied that the parties have a genuine and continuing spouse relationship. Therefore, it makes no finding on the issue of the applicant's inability to meet the Schedule 3 criteria.
69. On the basis of the above the Tribunal **is not** satisfied that the requirements of s 5F(2) are met at **the time the visa application was made** and at **the time of this decision**.

70. Therefore, the applicant does not meet cl.820.211(2)(a) and cl.820.221.
71. The Tribunal has considered whether the alternative criteria in cl 820.211(7), 820.211(8), 820.211(9), 820.221(2), 820.221(3) (death, family violence, child exceptions) are met.
72. The Tribunal finds no evidence that the alternative criteria can be met.
73. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

74. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Michael Cooke
Senior Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).

Schedule 3

3001

- (1) The application is validly made within 28 days after the relevant day (within the meaning of subclause (2)).
- (2) For the purposes of subclause (1) and of clause 3002, the relevant day, in relation to an applicant, is:
 - (a) if the applicant held an entry permit that was valid up to and including 31 August 1994 but has not subsequently been the holder of a substantive visa — 1 September 1994; or
 - (b) if the applicant became an illegal entrant before 1 September 1994 (whether or not clause 6002 in Schedule 6 of the Migration (1993) Regulations applied or section 195 of the Act applies) and has not, at any time on or after 1 September 1994, been the holder of a substantive visa — the day when the applicant last became an illegal entrant; or
 - (c) if the applicant:
 - (i) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
 - (ii) entered Australia unlawfully on or after 1 September 1994;whichever is the later of:
 - (iii) the last day when the applicant held a substantive or criminal justice visa; or
 - (iv) the day when the applicant last entered Australia unlawfully; or
 - (d) if the last substantive visa held by the applicant was cancelled, and the Tribunal has made a decision to set aside and substitute the cancellation decision or the Minister's decision not to revoke the cancellation — the later of:
 - (i) the day when that last substantive visa ceased to be in effect; and
 - (ii) the day when the applicant is taken, under sections 368C, 368D and 379C of the Act, to have been notified of the Tribunal's decision.

3003

If:

- (a) the applicant has not, on or after 1 September 1994, been the holder of a substantive visa; and
- (b) on 31 August 1994, the applicant was either:
 - (i) an illegal entrant; or
 - (ii) the holder of an entry permit that was not valid beyond 31 August 1994;

the Minister is satisfied that:

- (c) the applicant last became an illegal entrant, or, in the case of a person referred to in subparagraph (b)(ii), last became a person in Australia without a substantive visa, because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with the conditions that apply or applied to:
 - (i) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (ii) any subsequent bridging visa; and
- (f) the applicant would have been entitled to be granted an entry permit equivalent to a visa of the class applied for if the applicant had applied for the entry permit immediately before last becoming an illegal entrant or, in the case of a person referred to in subparagraph (b)(ii), if the applicant had applied for the entry permit on 31 August 1994; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) the last entry permit (if any) held by the applicant was not granted subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.

3004

If the applicant:

- (a) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or

- (b) entered Australia unlawfully on or after 1 September 1994 and has not subsequently been granted a substantive visa;

the Minister is satisfied that:

- (c) the applicant is not the holder of a substantive visa because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with:
 - (i) the conditions that apply or applied to:
 - (A) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (B) any subsequent bridging visa; or
 - (ii) the conditions that apply or applied to:
 - (A) the last of any substantive visas held by the applicant (other than a condition of which the applicant was in breach solely because the visa ceased to be in effect); and
 - (B) any subsequent bridging visa; and
- (f) either:
 - (i) in the case of an applicant referred to in paragraph (a) — the applicant would have been entitled to be granted a visa of the class applied for if the applicant had applied for the visa on the day when the applicant last held a substantive or criminal justice visa; or
 - (ii) in the case of an applicant referred to in paragraph (b) — the applicant would have satisfied the criteria (other than any Schedule 3 criteria) for the grant of a visa of the class applied for on the day when the applicant last entered Australia unlawfully; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) if the last visa (if any) held by the applicant was a transitional (temporary) visa, that visa was not subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.